In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-1453

NEWSPAPER AND PERIODICAL DRIVERS & HELPERS UNION, LOCAL 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

SAN FRANCISCO NEWSPAPER PRINTING CO., INC.,
Respondent,

and

DOUGLAS BROWN, WALTER DELONG, PHILIP T. WALKER, MARVIN W. WEISSENSEE, KENNETH C. WOLLMAN, JOHN ROY CONWAY, LEROY LESTER HOLBROOK, DARRELL E. BAKER, and WILLIS P. KOLB,
Respondents.

BRIEF OF THE INDIVIDUAL RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the Court of Appeals correctly held there was substantial evidence on the whole record to support the Board's finding that the provision of the

March 1968 supplemental collective bargaining agreement between the Company and Union requiring termination of the Company's contracts with dealers who are independent contractors and retaining such individuals, if at all, only as employees subject to the Union's jurisdiction, was aimed principally at the nonunion dealers, not at the Company, and, therefore, secondary and unlawful under Section 8(e) of the National Labor Relations Act, 29 U.S.C. §158(e)?

STATEMENT OF THE CASE

(A) The Proceedings to Date

Respondents Brown, DeLong, Walker, Weissensee and Wollman filed unfair labor practice charges with the respondent National Labor Relations Board ("Board") on March 27, 1970 contending that their prospective termination as independent newspaper dealers, pursuant to Section 1(b) of the March 22, 1968 Supplemental Agreement by and between respondent San Francisco Newspaper Printing Company, Inc. ("Company") and petitioner Newspaper and Periodical Drivers' & Helpers' Union, Local No. 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America ("Union") violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. Section 158(e) ("Act").[1]

[1]The transcript of record is in five volumes. Volume 1 is the Clerk's Transcript, referred to as "CT." Volumes 2 and 3 are the Reporter's Transcript, referred to as "RT." Volumes 4 and 5 are the exhibits. "GC Ex." refers to the General Counsel's exhibit. "PU Ex." refers to the petitioner Union's exhibit. "RC Ex." refers to the respondent Company's exhibit. "CP Ex." refers to the charging parties' exhibit (the individual respondents herein).

Identical unfair labor practice charges were filed by respondents Conway and Holbrook on June 4, 1970 and by respondents Baker and Kolb on August 24, 1970. CT 5-53, 65-75.

After a five months investigation the Board issued a consolidated complaint on August 19, 1970, amended on September 24, 1970, against the Company and the Union alleging that they violated Section 8(e) of the Act by entering into, reaffirming, maintaining, and giving effect to an agreement requiring the Company to cease doing business with the individual respondents and other similarly situated newspaper dealers. CT 54-62, 81-83.

On September 18, 1970 the United States District Court for the Northern District of California, upon application of the Board, issued a temporary injunction, pursuant to Section 10(1) of the Act, 29 U.S.C. Section 160(1), enjoining, pending the disposition of the unfair labor practice charges before the Board, the Company and the Union from reaffirming, invoking, implementing or enforcing Section 1(b) of the March 22, 1968 Supplemental Agreement insofar as it required the Company to cease doing business with its newspaper dealers.

On November 18, 23, 24, 25, 27, 1970 and on December 9, 10, 11, 14, 15, 16, 17, 18, 1970, a hearing was held before the Hon. Herman Corenman, Administrative Law Judge, on the consolidated complaint, as amended. At this hearing seventeen witnesses testified producing some 2051 pages of hearing transcript and 151 exhibits were marked and identified.

On April 27, 1971, the Administrative Law Judge rendered his decision. He concluded that the newspaper dealers whom the Company and the Union have designated for termination on specified dates are employees and not independent contractors within the meaning of Section 2(3) of the Act. As a result of this conclusion he held that the March 22, 1968 Supplemental Agreement by and between the Company and the Union was not an agreement "to cease doing business with any other person" within the meaning of Section 8(e) of the Act. The Administrative Law Judge recommended to the Board that it issue an order dismissing the complaint in its entirety. CT 124-151.

The Administrative Law Judge refrained from ruling on the other issue before him, to wit: If the newspaper dealers are found to be independent contractors, whether Section 1(b) of the March 22, 1968 Supplemental Agreement has a primary work preservation objective so as to insulate it from a Section 8(e) violation. CT 130.

Both the General Counsel to the Board and the individual respondents took exception to the Administrative Law Judge's decision. CT 152-192, 197-207. The Company took limited exception to the decision. CT 193-196.

On November 8, 1971, the Board, Member Ralph E. Kennedy dissenting, issued its decision and order adopting the findings, conclusions and recommendations of the Administrative Law Judge and dismissing the complaint against the Company and the Union.

194 NLRB 37; CT 208-215. On November 9, 1971, the individual respondents filed with the United States Court of Appeals for the Ninth Circuit their petition to review the Board's decision and order. On November 30, 1971 the United States District Court dissolved the temporary injunction which it had previously made on September 18, 1970.

Following the dissolution of the temporary injunction the Company proceeded to put into effect its agreement with the Union to terminate various newspaper dealers as well as to take portions of the territory of other dealers.

On January 3, 1972, the individual respondents filed with the Court of Appeals their motion to expedite the review of the decision and order of the Board, for a stay of the Board's order and for a restraining order enjoining the Company from reaffirming, invoking, implementing or enforcing any agreement, contract or understanding it has with the Union insofar as it requires the Company to cease doing business with the individual respondents and other similarly situated newspaper dealers pending review by the Court of Appeals. By its orders of January 6, 1972, January 10, 1972, and January 24, 1972 the Court of Appeals expedited the review, stayed the Board's order pending review and issued and continued the requested restraining order to March 8, 1972, or until further order of the Court.

On June 12, 1972, the Court of Appeals issued its decision and order, finding that the Board erred in concluding that the newspaper dealers were employees

and finding instead that they were independent contractors. The Court of Appeals remanded the case to the Board to determine whether a violation of Section 8(e) of the Act, 29 U.S.C. Section 158(e) had occurred. *Brown v. NLRB,* 462 F.2d 699 (9th Cir. 1972). A joint petition for a Writ of Certiorari was filed by the Company and by the Union and denied by this Court on November 13, 1972. 409 U.S. 1008.

Upon remand the Board issued a Supplementary Decision and Order holding that the provision of the collective bargaining agreement requiring the termination of the independent contractor status of the dealers did not have a primary work preservation objective so as to insulate it from a Section 8(e) violation, but that "the provision for termination of the dealers' contacts is aimed principally at the nonunion independent dealers, not at the primary employer" and "therefore, is secondary and unlawful under Section 8(e)." 204 NLRB No. 60; CT 6.

The Board ordered the Company and the Union to cease and desist from entering into, maintaining, giving effect to, or attempting to enforce the provisions of Section 1(b) of the March 22, 1968 supplemental agreement between the Company and Union to the extent said provisions were found to be unlawful. The Board also ordered the Company to "offer to any of the independent contractors, whose dealership contracts were terminated pursuant to the unlawful provisions of the supplemental agreement any time since 6 months before charges were filed in the instant proceeding, reinstatement of their dealership contracts." 204 NLRB No. 60; CT 7-8.

On or about July 20, 1973 the Union filed a petition for review of the Board's Supplementary Decision and Order with the United States Court of Appeals for the District of Columbia. The individual respondents subsequently filed on August 17, 1973 a cross-petition to review the Board's Supplementary Decision and Order.[2] The Board thereafter filed against the Company an application for enforcement of its order and a motion consolidating all three cases. That motion was granted.

On October 19, 1973 the individual respondents moved the United States Court of Appeals for the District of Columbia for a change of venue and transfer of all three cases to the United States Court of Appeals for the Ninth Circuit. That motion was granted.

On or about March 29, 1974, the Board moved pursuant to Section 10(e) of the Act for temporary relief to provide for the reinstatement of the dealership contracts of former dealers Leroy Holbrook and Wray Chain, pending final order of the Court. That motion was granted.

On December 23, 1974, the Court of Appeals denied the petitions of the Union and the individual respondents and granted the application of the Board for enforcement of its order. 509 F.2d 99 (9th Cir. 1974). The Court of Appeals held that there was substantial evidence on the whole record to support

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[2]The cross-petition of the individual respondents sought review of that portion of the Board's Supplementary Decision and Order which denied compensatory damages or back pay to dealers who had been terminated under the collective bargaining agreements.

the Board's finding of a Section 8(e) violation. Judgment was entered by the Court of Appeals on February 18, 1975.

(B) The Facts Relevant to the Issue Presented

At the time of the hearing before the Administrative Law Judge the Union represented 615 persons employed by the Company. Of these 615, 106 were employed as highway drivers, local drivers and new drivers Classifications II, III and IV under the collective bargaining agreement. Their function was to deliver the newspapers from the printing plant to transfer points and to dealers such as the individual respondents. These drivers would drive as far as the Oregon border, Nevada and Bakersfield to deliver the newspapers. Six of the 615 were employed as rack repairmen. The remaining 503 employees were employed as wholesalers Classification I under the collective bargaining agreement. Their function was to engage in the promotion, distribution, delivery, sale and collection of the Company's products through carrier boys, sales boys, news vendors, news stands and or other outlets. RC Ex. No. 28; GC Exs. Nos. 2, 3; RT 1513, 1824.

The Union presently represents wholesalers engaged in the distribution of the San Francisco Chronicle and Examiner newspapers in the following geographical areas: City and County of San Francisco; Oakland, Berkeley, Albany, San Leandro, Hayward, Castro Valley and the northern portion of Alameda County; San Mateo County except for Hillsborough and Woodside; the portion of Santa Clara County from Palo

Alto and Mountain View to and including parts of San Jose except for Los Altos Hills and Stanford. The Union also represents wholesalers engaged in the distribution of the San Francisco Examiner in the southern portion of Marin County from the San Rafael hills to the Golden Gate. In all other areas the San Francisco Chronicle and Examiner newspapers are distributed through independent newspaper dealers under contract with the Company. RT 1506-07.

From the time it first represented wholesalers engaged in the distribution of the Chronicle and Examiner newspapers until the making of the December 2, 1955 collective bargaining agreement (GC Ex. No. 44) the cities of San Francisco, Oakland, Berkeley and Alameda were the areas where the Chronicle and Examiner were distributed through persons (termed "wholesalers") represented by the Union. GC Exs. Nos. 26 through 43.

Prior to the making of the December 21, 1955 collective bargaining agreement the Union made a number of efforts to organize and represent the newspaper dealers. RT 1971. Since the making of the December 21, 1955 collective bargaining agreement the Union has made no efforts to organize and represent the newspaper dealers because it has been able to extend its geographical jurisdiction through collective bargaining agreements. RT 1895-96.

The December 2, 1955 collective bargaining agreement represented the first contract between the Union and the Company providing for the termination of newspaper dealers and their replacement by employ-

ees working under the jurisdiction of the Union. GC Ex. No. 44. This agreement extended the jurisdiction of the Union to the cities of South San Francisco, San Leandro, Albany and El Cerrito on various specified date. GC Ex. No. 44.

Since the making of the December 21, 1955 collective bargaining agreement, the Union has extended its jurisdiction to its present boundaries as heretofore described through the termination of newspaper dealers and their replacement by employees working under its jurisdiction. This has been accomplished solely through the means of collective bargaining agreements. GC Exs. Nos. 45-50, 2, 3.

The membership of the Union employed by the various San Francisco newspapers in early 1940 was 300 or 320; in 1946 it was 260 to 280; and in the later part of the 1940s it was better than 400. RT 1883. Despite the elimination of two major San Francisco newspapers in the last twenty years (The News and The Call-Bulletin), the Union had increased its membership to 615 at the time of the hearing. RC Ex. No. 28.

In each of the areas that the Union extended its jurisdiction, the Chronicle and Examiner had always been distributed through independent newspaper dealers and not through employees. RT 1307-1375.

The elimination of newspaper dealers and their replacement by employees working under the jurisdiction of the Union increased the number of persons required to distribute the newspapers in the former dealer's territory. RT 1464, 1550-51, 1877.

The Union and the Company have an agreement that in areas where employees working under the Union's jurisdiction distribute the newspapers, adult carriers or drivers will not be used to provide the actual delivery of the newspaper to the home delivery subscriber. This means that when a newspaper dealer is terminated and replaced by employees working under the Union's jurisdiction, the adult carriers or drivers that he utilized are eliminated and replaced by boy carriers. RT 1447, 1553.

The 1967 collective bargaining agreement and the 1968 supplemental agreement between the Union and the Company (GC Exs. Nos. 2, 3) provides for the extension of the Union's jurisdiction on various specified dates to areas presently being handled by the individual respondents and other newspaper dealers. These agreements also provide that, "The dealer in any one or all of the above designated cities whose contract is terminated . . . shall, at the Employer's option, be permitted to continue in that same territory as an employee working under Union jurisdiction . . ." The Company does not consult with its newspaper dealers regarding whether or not they want to have their area converted to an employee operation. RT 1470-72.

The Union's area of claimed jurisdiction is open-ended. As stated by its president, Mr. Goldberger, "we are going to take jurisdiction on anything we can. If you deliver Jim Clips, rubber bands, whatever you use to cover up a wet newspaper, we claim jurisdiction for that." RT 1894. The Union has requested

jurisdictional recognition for as far away as Merced, California and Sacramento, California. RT 1829.

ARGUMENT

THIS CASE DOES NOT PRESENT ISSUES WHICH THE SUPREME COURT SHOULD DECIDE BY THE ISSUANCE OF A WRIT OF CERTIORARI

The Union's Petition ignores the fact that the granting of a writ of certiorari is not designed to give a second review of the evidence in support of the Board's decision. As pointed out below, this case does not fall into any of the categories outlined in Rule 19 of the Supreme Court Rules. The case merely involves the question of whether there was substantial evidence on the whole record to support the Board's finding that the provision of the agreement between the Company and Union requiring the termination of the Company's contracts with its non-union dealers was secondary in objective and therefore within the prohibition of Section 8(e) of the Act.

In *National Woodwork Manufacturers Association, et al. v. N.L.R.B.*, 386 U.S. 612, the Court held that an agreement falling within the literal terms of Section 8(e) is lawful if the Union's objective in obtaining the agreement was the *preservation* of work traditionally and customarily performed by employees in the unit covered by the agreement. The facts in the instant case establish that the Union's objective was one of *work acquisition rather than work preservation.*

Having failed to persuade the dealers to become members, the Union sought to force the same result through its collective bargaining agreement with the Company. Thus, as candidly admitted by Union President Jack Goldberger, he has sought unsuccessfully to organize the dealers prior to December 1955. RT 1971. Having failed to persuade the dealers to join the Union by the usual organizing methods, Goldberger decided to "approach it the next time in collective bargaining," the result of which was the termination clause at issue herein. RT 1874. However, as pointed out by the Third Circuit in *A. Duie Pyle, Inc. v. N.L.R.B.*, 383 F.2d 772, 777 (3d Cir. 1967), cert. denied, 390 U.S. 905, in which owner-operators of trucks leased to common carriers were, as here, required by a union-company contract to relinquish their status as independent contractors and to become union members:

> As in the case of secondary boycotts generally, a union may not employ a collective bargaining agreement with one employer as a means of effectuating its object to coerce another employer to unionize, *nor may it by this means seek to coerce self-employed persons to become union members.* (Emphasis supplied).

Here the self-employed dealers, in precise analogy to the owner-operators in *Pyle*, had a right under the Act to refuse to become union members, and the contract clause, which, in effect, required them either to join the union or to give up their means of livelihood, violated Section 8(e).

The Union argues however (Petition, p. 10) that the purpose of the clause was solely to follow the movement of subscribers to the suburbs and thus to preserve work traditionally performed by the unit employees from reductions resulting from such movement. However, even if one motive for effectuating the agreement may have been work preservation, it is clear that, as the Board stated, this aspect of the agreement "is incidental to the cessation of doing business instead of the other way around". CT 228.[3]

Thus, the record demonstrates that (1) no bargaining unit employees are shown to have been deprived of work because of the circulation shift; (2) the agreement permits dealers to continue to work their accustomed territories provide they accept employee status and join the Union; (3) such arrangements add no substantial work opportunities for bargaining unit employees but instead add only new employees who must become union members (CT 228); (4) the Union's jurisdiction will include geographical areas never before served by bargaining unit personnel;[4]

[3]It is settled that only one object need be secondary in nature to substantiate a violation of the Act. *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675, 689 (1951); *Riverton Coal Co. v. U.M.W.*, 453 F.2d 1035, 1040 (C.A. 6, 1972).

[4]Compare *Meat and Highway Drivers' Local 710 v. N.L.R.B.* 335 F.2d 709, 714 (D.C. Cir. 1964) (no violation found because union sought recapture of local meat delivery work once done by bargaining unit where packing plants moved out of Chicago inner-city area). Accord: *American Boiler Mfrs' Ass'n v. N.L.R.B.*, 404 F.2d 547, 552 (C.A. 8, 1968) cert. denied, 398 U.S. 960. Unlike the recaptured routes in *Local 710*, none of the dealer territories herein has ever been served by unit employees, and all the individual respondents have maintained their dealerships with the Company for substantial periods: Douglas Brown, seven years (RT 38); Marvin Weissensee, six and one-half years (RT 207); Philip Walker, three years, ten months (RT 341); Willis Kolb, four years (RT 466); Walter DeLong, five years (RT 575); Kenneth Wollman, nine years (RT 693); Darrell Baker, six years, three months (RT 758); John Conway, six years (RT 859); Leroy Holbrook, four years, three months (RT 939); Wollman and Holbrook have been professional dealers for twenty years and DeLong for fifteen (RT 682, 939, 575).

and finally; (5) no showing was made that the termination was necessary to protect unit work standards. The record thus reveals that the "agreement was primarily aimed at" the dealers and their non-union status, and "was not for the purpose of preserving work for unit employees, and therefore, constituted an unlawful hot-cargo agreement." *Marriott Corp. v. N.L.R.B.*, 491 F.2d 367, 370 (1974), enforcing 197 NLRB No. 18 (1972), citing *National Woodwork, supra.*

In its petition to the Court, the Union has cited no evidence that the independent dealers threaten to displace unit employees from their jobs.[5] Indeed, the number of employees in the unit has increased since the nineteen forties. Furthermore, it is without dispute that the distribution of newspapers in geographical areas serviced by dealers was not previously performed by the bargaining unit. The Union has acknowledged that its concern was not limited to preserving the work of unit employees. As frankly stated by President Goldberger: "Our reasons for organizing the dealerships goes beyond just preservation

[5]Cf. *National Woodwork, supra*, 386 U.S. at 644, n. 38 (listing "the remoteness of the threat of displacement by the banned product or services" as a critical factor in evaluating work preservation claims).

of work . . . [to] the purpose of creating work, which is our obligation as a labor organization". (RT 1939).[6] In these circumstances, the Union was clearly using the dealer termination clause not as "a shield carried solely to preserve members' jobs [in the unit]" *(National Woodwork, supra,* 386 U.S. at 630), but rather "as a sword" to organize the dealers outside the unit and to advance the interests of Union members generally. In short, the termination clause boils down to an agreement not to do business with any dealer who does not become a Union member; it reflects ". . . a concern with membership, not jobs." *N.L.R.B. v. Milk Drivers Union, Local 753,* 392 F.2d 845, 849 (7th Cir. 1968). As such, it is a union-signatory clause in reverse, for instead of requiring that no work be given to contractors who do not have agreements with the Union, it requires that contractors who already have the work give it up unless and until they become members of the Union. See *Pyle, supra; Retail Clerks Int'l Ass'n Local Union 1288 v. N.L.R.B.,* 390 F.2d 858, 862 (D.C. Cir. 1968); *N.L.R.B. v. National Maritime Union,* 486 F.2d 907, 913 (2nd Cir. 1973); Compare *District 9, IAM v. N.L.R.B.,* 315 F.2d 33, 36-37 (D.C. Cir. 1962); *Culinary Alliance Local 402,* 175 NLRB 161, 168-169 (1969), remanded on grounds of probable mootness, 436 F.2d 1379 (C.A. 9, 1971). As such it clearly violates Section 8(e).

[6]Goldberger testified that conversion of dealership to union jurisdiction had resulted in a gain of "a man-and-a-half" to "two-and-a-half" in employment of union members (RT 1878-1879, 1921).

CONCLUSION

For the foregoing reasons, the individual respondents respectfully pray that the Petition for a Writ of Certiorari be denied.

Dated: June 16, 1975.

Respectfully submitted,
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